

APR 28 2009


Honorable Robert F. Bennett
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Senator Bennett:

Enclosed you will find my responses to the written questions submitted following my confirmation hearing on April 23, 2009.

If I can be of further assistance, please do not hesitate to contact me.

Sincerely,


Hilary C. Tompkins
Solicitor – Designate

Enclosure

Solicitor – Designate Tompkins

Senator Bennett

17. Do you agree that the Department's authority to establish new Wilderness Study Areas under Section 603 of FLPMA expired no later than October 21, 1993?

Answer: It is my understanding that in a brief filed in the 10th Circuit, the Department of the Interior took the position that its authority to establish new Wilderness Study Areas under section 603 of FLPMA expired on October 21, 1993. I also understand that there is new litigation concerning this issue. If confirmed, I look forward to learning more about this topic.

Solicitor – Designate Tompkins

Senator Bennett

18. Do you agree that the Department currently has no authority to establish new WSAs (post-603 WSAs) under any provision of federal law, such the Wilderness Act of Section 202 of FLPMA?

Answer: It is my understanding that other provisions of FLPMA, such as section 202 and the Wilderness Act, have been interpreted to give the Department of the Interior the authority to manage land for wilderness values. I have not had an opportunity to review the various concerns that have been raised with respect to the Department's use of these authorities. I am also aware that there is new litigation concerning this issue. If confirmed, I look forward to learning more about this topic.

Solicitor – Designate Tompkins

Senator Bennett

19. Do you agree that the Department has not had the authority to create any new WSAs since the expiration of FLPMA Section 603 on October 21, 1993?

Answer: As I noted in my response to question 17, it is my understanding that in a brief filed in the 10th Circuit, the Department of the Interior took the position that its authority to establish new Wilderness Study Areas under section 603 of FLPMA expired on October 21, 1993. As I also noted in that response, I understand that there is new litigation concerning this issue and I look forward to learning more about this topic.

Solicitor – Designate Tompkins

Senator Bennett

20. Do you agree with federal Judge Dee Benson that the settlement agreement between the state of Utah and the United States is consistent with FLPMA?

Answer: Thank you for providing me with a copy of the settlement agreement approved by Judge Dee Benson in *Utah v. Norton* during our meeting last week. It is my understanding that the Department took the position in the 10th Circuit that this settlement agreement was consistent with FLPMA. As I stated earlier, I am aware that there is new litigation concerning this issue and I look forward to learning more about this topic. I do understand that the decisions made by agencies in Washington D.C. have serious repercussions on the lives of people who live near vast Federal land holdings in the West. If confirmed, I will advise the Secretary regarding his options under applicable laws as well as the impacts of proposed changes in applicable statutes.

Solicitor – Designate Tompkins

Senator Bennett

21. Does the BLM have authority to apply the non-impairment standard, as enumerated in the Interim Management Plan for wilderness study areas, to lands that are not designated as WSAs under Section 603?

Answer: As I discussed in my previous answer, I believe that wilderness management is a complex topic with serious repercussions. If confirmed, I will advise the Secretary on how he can manage lands consistent with the requirements of FLPMA. I have not had an opportunity to review the question of whether BLM has the authority to apply the non-impairment standard, as described in the Interim Management Plan for wilderness study areas, to lands not designated as WSAs under Section 603 of FLPMA. However, if confirmed, I look forward to learning more about this topic and advising the Secretary.

Solicitor - Designate Tompkins

Senator Bennett

22. Under what legal authority did Secretary Salazar cancel the 77 leases earlier this year?

Answer: I was not involved in this decision, nor have I discussed the basis for this decision with Secretary Salazar. My general understanding is that in this situation the Secretary was acting in accordance with his general discretion to offer parcels for lease/sale or to determine not to offer parcels for lease/sale. If I am confirmed I will certainly learn more about this topic.

Solicitor - Designate Tompkins

Senator Bennett

23. Utah has made significant progress on the R.S. 2477 issue. The legislature recently established a process to record rights-of-way that were accepted under the terms of R.S. 2477. The state has submitted approximately 2,500 such rights-of-way for non-binding determinations to the Utah Office of the Bureau of Land Management. Could you please explain how the recorded data will be used for such determinations?

Answer: If I am confirmed as Solicitor, you have my commitment that I will study the issues that surround the RS 2477 claims and work towards a resolution.

Solicitor – Designate Tompkins

Senator Bennett

24. Do you support the use of non-binding administrative determinations to help resolve the R.S. 2477 issue in each state?

Answer: I have not had the opportunity to examine whether the use of non-binding administrative determinations may be able to help resolve R.S. 2477 issues. If confirmed, I will commit to studying this issue and supporting policymakers at DOI in their efforts to resolve issues surrounding R.S. 2477.

Solicitor – Designate Tompkins

Senator Bennett

25. Much of the evidence of the acceptance of the R.S. 2477 grant is in the form of personal knowledge. Since the people who have this knowledge won't always be with us, the state has been gathering affidavits from witnesses to road construction or continuous use and will include the affidavits in its requests for non-binding determinations of the validity of the rights-of-way. I am concerned that the DOI solicitor's office in Utah has refused to consider individual affidavits that provide some evidence of either construction or continuous use, but do not prove evidence of the complete acceptance of the R.S. 2477 grant. This would be tantamount in a criminal trial to ignoring all witnesses that didn't see the entire spectrum of the crime – if they didn't see the murder suspect purchase the gun, shoot the gun, and hit their target, their testimony wouldn't count.

(a) Who is the factfinder in a non-binding determination?

Answer: It is my understanding that BLM is the factfinder in a non-binding determination involving BLM lands.

(b) Is the factfinder entitled to arbitrarily and capriciously ignore evidence that, when taken in a totality, would prove the acceptance of the R.S. 2477 grant, even if the information were contained in more than one affidavit?

Answer: I agree with your general premise that government decisionmakers are not entitled to act arbitrarily and capriciously. I would need specific knowledge of the affidavits in question in order to evaluate whether a particular decision might be arbitrary or capricious.

(c) Is there any rule of law or policy in the Department of the Interior that would preclude the factfinder from considering affidavits that did not, *per se*, show acceptance of the R.S. 2477 grant, but tended to show some evidence of either construction or continuous use for the statutory period?

Answer: I have not had the opportunity to examine the non-binding determination process in detail, including any rule of law or policy addressing the types of information that would be relevant when considering a request for a non-binding determination.

(d) May the factfinder in a non-binding determination consider information in an affidavit that tends to show some evidence of either construction or continuous use for the statutory period but not all evidence?

Answer: I have not had the opportunity to examine the non-binding determination process in detail, including the types of information that would be relevant when considering a non-binding determination for a claimed R.S. 2477 right-of-way.